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9

10 UNITED STATES DISTRICT COURT
11 CENTRAL DISTRICT OF CALIFORNIA
12 WESTERN DIVISION

13 AKC GLOBAL, LLC A KILLER'S
14 CONFESSION, AND WAYLON
15 REAVIS,

16 Plaintiffs,

17 v.

18 NETFLIX, INC.,

19 Defendant.

CASE NO.: 2:22-cv-08847-DSF-KS

Hon. Dale S. Fischer

**NOTICE OF MOTION AND MOTION
OF DEFENDANT NETFLIX, INC. TO
DISMISS PLAINTIFFS'
COMPLAINT, IN ITS ENTIRETY,
PURSUANT TO FEDERAL RULE OF
CIVIL PROCEDURE 12(b)(6);
MEMORANDUM OF POINTS AND
AUTHORITIES IN SUPPORT
THEREOF**

20
21 Date: June 12, 2023
Time: 1:30 p.m.
22 Ctrm: 7D
23 Filed: 12/06/2022
Trial Date: None set
24
25
26
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TO THE COURT, ALL PARTIES, AND COUNSEL OF RECORD:

PLEASE TAKE NOTICE that on June 12, 2023, at 1:30 p.m., or as soon thereafter as the matter may be heard before the Honorable Dale S. Fischer in Courtroom 7D, located at 350 West 1st Street, Los Angeles, CA 90012, Defendant Netflix, Inc. (“Netflix”) will and hereby does move, pursuant to Rule 12(b)(6) of the Federal Rules of Civil Procedure, for an Order dismissing Plaintiffs AKC Global, LLC’s, A Killer’s Confession’s, and Waylon Reavis’s Complaint (Dkt. 13), in its entirety, without leave to amend.

This Motion is made on the grounds that the Complaint fails to and cannot state a claim for relief under Rule 12(b)(6).

This Motion is based upon this Notice of Motion and Memorandum of Points and Authorities; the concurrently filed Request for Judicial Notice and Declaration of Emily F. Evitt in support thereof; all pleadings and other records on file in this action; any other matters that may be judicially noticed; and such further evidence and arguments as may be presented at or before the hearing on this Motion.

This Motion is made following the conference of counsel pursuant to L.R. 7-3, which took place on April 24, 2023.

Dated: May 5, 2023

MITCHELL SILBERBERG & KNUPP LLP

By: /s/Robert H. Rotstein

Robert H. Rotstein
Emily F. Evitt
Attorneys for Defendant Netflix, Inc

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MEMORANDUM OF POINTS AND AUTHORITIES

I. INTRODUCTION

In this meritless action for trademark infringement and related claims, Plaintiffs allege that the title of Netflix’s 2019 docuseries *The Confession Killer* (the “Docuseries”) violates the Lanham Act, 15 U.S.C. §§ 1114, 1125, and California’s unfair competition law by infringing upon the name of their rock band, “A Killer’s Confession” (“AKC”). Because the Complaint flouts binding Ninth Circuit authority, it should be dismissed under Federal Rule of Civil Procedure 12(b)(6) without leave to amend.

First, the First Amendment protects Netflix’s use of the title “The Confession Killer.” *See Rogers v. Grimaldi*, 875 F.2d 994 (2d Cir. 1989). The Docuseries tells the story of Henry Lee Lucas, who confessed to hundreds of murders in the United States. Years later, DNA testing proved that most of these confessions were lies. Because Netflix’s use of the title easily clears the requirement of minimal artistic relevance and does not explicitly mislead as to the source or the content of the Docuseries, the First Amendment trumps any alleged trademark infringement.

Second, the Complaint should be dismissed for the independent reason that, under the Ninth Circuit’s “likelihood of confusion” test set forth in *AMF, Inc. v. Sleekcraft Boats*, 599 F. 2d 341 (9th Cir. 1979), consumers are unlikely to be confused between Plaintiffs’ use of “A Killer’s Confession” for sound recordings and live musical performances and Netflix’s use of “The Confession Killer” as the title of a true crime documentary miniseries.

For both of these independently sufficient reasons, the Complaint should be dismissed with prejudice.

II. FACTUAL ALLEGATIONS¹

A. *Plaintiffs And Their Use Of “A Killer’s Confession.”*

Plaintiff AKC is an alternative heavy metal band from Cleveland, Ohio. Complaint ¶ 2. Plaintiff Waylon Reavis is a member of AKC and its lead singer. Complaint ¶ 3. Plaintiffs allege that they have used the term “A Killer’s Confession” in connection with live performances, sound recordings, and related merchandise since late-2016. Complaint ¶¶ 10, 11.²

B. *Defendant Netflix And The Docuseries.*

In or around December of 2019, Netflix—an entertainment company that streams television and film content to millions of subscribers in countries around the world (Complaint ¶ 4)—made available for streaming the series *The Confession Killer*, a five-episode docuseries that tells the story of Henry Lee

¹ As is appropriate on a motion to dismiss under Rule 12(b)(6), the summary of the factual allegations comes from the face of the Complaint, material incorporated by reference therein (including, but not limited to, the Docuseries), and other material that may be judicially noticed. As set forth in the contemporaneously filed Request for Judicial Notice (“RJN”), the Court may consider these materials at this stage under applicable law.

² Plaintiffs have released songs with titles such as “Roots Bloody Roots,” “Monster,” “Final Breath,” and “Knife from Behind.” See *AKillersConfession, A Killer’s Confession – Roots Bloody Roots (Official Video)*, YOUTUBE (Feb. 23, 2023), <https://www.youtube.com/watch?v=hiRiOTYsYj0>; *A Killer’s Confession – Remember*, DISCOGS, <https://www.discogs.com/release/20594368-A-Killers-Confession-Remember> (last visited May 4, 2023) (listing songs titled “Knife from Behind” and “Monster”); *A Killer’s Confession – Unbroken*, DISCOGS, <https://www.discogs.com/release/10382307-A-Killers-Confession-Unbroken> (last visited May 4, 2023) (listing song titled “Final Breath”). Plaintiffs’ merchandise encourages people to “kill pedophiles,” and in 2017, Plaintiffs announced an upcoming “Year of the Killers Tour.” See *A Killer’s Confession*, SHOPIFY, <https://akillersconfession.myshopify.com/collections/frontpage/products/kill-all-pedophile> (last visited May 4, 2023); *A Killer’s Confession Announces “Year of the Killers Tour,”* DIGITAL TOUR BUS (Jan. 6, 2017), <https://www.digitaltourbus.com/news/killers-confession-announces-north-american-tour/>.

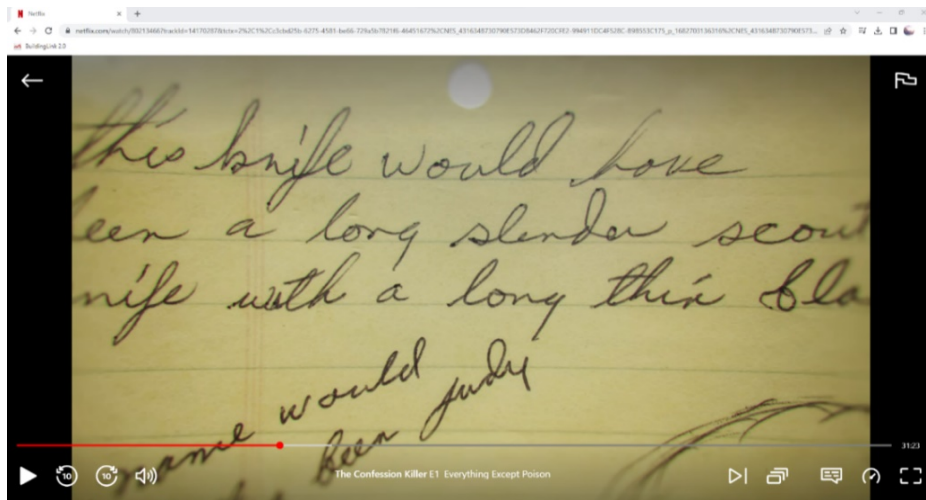
1 Lucas, a convicted serial killer (the “Docuseries”). Docuseries, RJN, Ex. A;
 2 Complaint ¶¶ 15, 19. Lucas became infamous for falsely confessing to
 3 approximately 600 murders in the 1980s. Docuseries, RJN, Ex. A. Many
 4 unsolved cases were prematurely closed based on Lucas’s false confessions.
 5 Docuseries, RJN, Ex. A. Ultimately, DNA evidence proved the falsity of many of
 6 Lucas’s confession. Docuseries, RJN, Ex. A.

7 Netflix’s name and logo are uniformly present on the page of its streaming
 8 platform where the Docuseries can be viewed, and on its marketing materials
 9 related to the Docuseries. *See, e.g.*, Complaint ¶ 8 (“**Defendants’** marketing,
 10 promotion, advertising, distribution, licensing, and offering of the ‘*Netflix*
 11 *Original Series...The Confession Killer*’ on its platform”);³ *id.* ¶ 32 (“Defendant’s
 12 advertising, promotion, distribution, and licensing of *Netflix’s ‘The Confession*
 13 *Killer’ series*”); Complaint, Ex. 2 (Dkt. 13-2) (advertisement for the Docuseries
 14 that expressly identifies it as “A NETFLIX ORIGINAL DOCUMENTARY
 15 SERIES” and additionally features Netflix’s bright red NETFLIX® logo); *see also*
 16 *The Confession Killer*, NETFLIX (2019), <https://www.netflix.com/title/80213588>
 17 (“Watch The Confession Killer | Netflix Official Site”); Netflix, *The Confession*
 18 *Killer | Now Streaming | Netflix*, FACEBOOK (Dec. 6, 2019),
 19 [https://www.facebook.com/netflixus/videos/the-confession-killer-now-streaming-](https://www.facebook.com/netflixus/videos/the-confession-killer-now-streaming-netflix/442208653386474/)
 20 [netflix/442208653386474/](https://www.facebook.com/netflixus/videos/the-confession-killer-now-streaming-netflix/442208653386474/).

21 The Docuseries illustrates how the Lucas story spiraled from a by-the-book
 22 murder case into a media frenzy in which Lucas and his handlers, the Texas
 23 Rangers, enabled confessions that shut down numerous departments’ botched or
 24 incomplete investigations. Docuseries, RJN, Ex. A. As part of that story, the
 25 Docuseries begins with a recorded confession by Lucas. Docuseries, RJN, Ex. A,

26
 27
 28 ³ Unless noted, all emphasis is added, and all citations and quotation marks
 omitted.

Episode 1 (~00:18-00:34). The Docuseries also features copies of Lucas's real confession notes, as shown below:



Docuseries, RJN, Ex. A, Episode 1 (~13:30-13:51). As is evident from a visual comparison between the handwriting in the confession note above (Docuseries, RJN, Ex. A, Episode 1 (~13:30-13:51)) and the font of the title of the Docuseries as displayed on Netflix's platform and marketing materials (Complaint, Ex. 2 (Dkt. 13-2)), the latter appears to be derived from the former.

Before the Docuseries aired—and before Plaintiffs starting using “A Killer’s Confession” in or around September of 2016—there were many works referring to Lucas as “The Confession Killer.” Examples include a November 7, 2012 article published by the *Texas Observer* titled “Highway Injustice,” which referenced “[i]nfamous ‘Confession Killer’ Henry Lee Lucas” (RJN, Ex. B) (available at <https://www.texasobserver.org/highway-injustice/>), and a February 2016 article published by *The Line Up* titled “Henry Lee Lucas: The Confession Killer” (RJN, Ex. C) (available at <https://the-line-up.com/henry-lee-lucas-confession-killer>); see also “Henry Lee Lucas: The Confession Killer” (1995), IMDB, <https://www.imdb.com/title/tt0854012/> (last visited Apr. 28, 2023) (episode of television series *The Serial Killers* featuring Lucas’s story).

1 In addition, many entertainment programs unconnected to Netflix's
 2 Docuseries have used the common terms "killer" and "confession" in their titles—
 3 some decades before Netflix (or Plaintiffs) used such terms. *See, e.g., Confessions*
 4 *of a Serial Killer* (1985), IMDB, <https://www.imdb.com/title/tt0092776/> (last
 5 visited Apr. 28, 2023); *Confessions of a Killer: Nightmare in Suburbia* (2012),
 6 IMDB, <https://www.imdb.com/title/tt2510962/> (last visited May 4, 2023);
 7 *Confession Killers* (2019), APPLE PODCASTS,
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 9 [and-ottis-toole/id1156343076?i=1000449157447](https://podcasts.apple.com/us/podcast/156-the-confession-killers-henry-lee-lucas-and-ottis-toole/id1156343076?i=1000449157447) (last visited May 4, 2023).

10 **C. Allegations Of The Complaint.**

11 On March 16, 2021—nearly a year and a half after the Docuseries
 12 premiered, and well *after* Lucas's moniker "The Confession Killer" was coined—
 13 Plaintiffs received a trademark registration for their "A Killer's Confession" logo.
 14 Complaint ¶ 18, n.2, and Ex. 1 (Dkt. 13-1); Trademark Registration No. 6,292,618
 15 (the "AKC Logo"). The AKC Logo consists of "the stylized wording 'A
 16 KILLER'S CONFESSION' with stylized droplets around the wording." *Id.* The
 17 AKC Logo covers the following services:

18 Entertainment services in the nature of presenting live
 19 musical performances; Entertainment, namely, live music
 20 concerts; Entertainment, namely, live performances by a
 21 musical band; live performances by a musical group;
 22 Entertainment in the nature of live audio performances
 23 by a musical artist; Providing a series of online non-
 24 downloadable audio recordings by a musical artist;
 25 Entertainment services, namely, providing online non-
 26 downloadable music recordings; Entertainment services,
 27 namely, providing non-downloadable series of music

1 recordings; Providing a series of online non-
2 downloadable music videos by a musical artist.

3 *Id.*⁴ Plaintiffs do not allege that they have ever applied to register the
4 word mark A KILLER’S CONFESSIOIN alone. *See generally*
5 Complaint.

6 Plaintiffs initiated this action on December 6, 2022,⁵ alleging claims for
7 relief for purported violations of the Lanham Act, and for unfair competition and
8 “unfair and deceptive acts” under California Business and Professions Code
9 §17000. All three claims for relief arise out of Netflix’s use of the words “The
10 Confession Killer” in the title of the Docuseries, and out of the *font style* in which
11 the title is written on Netflix’s platform and marketing materials. Plaintiffs do *not*
12 allege that Netflix used the title “The Confession Killer” to trade off of, or to
13 intentionally cause confusion with, Plaintiffs’ band name. Rather, Plaintiffs allege
14 that “[t]here has been actual confusion as to the origin between AKC and Netflix’s
15 [‘The Confession Killer’] . . . which has ranged from active boycotting of AKC on
16 the erroneous belief . . . that AKC is a supporter of serial killers, to actual death
17 threats against AKC members . . . to the continued interviews in which AKC is
18 associated with an unwavering support for serial killers, in particular of Henry Lee
19 Lucas, the subject of Netflix’s series.” Complaint ¶¶ 18, 19.

20 **III. GOVERNING LEGAL STANDARDS**

21 To state a valid claim for relief, a plaintiff must provide “more than labels
22 and conclusions, and a formulaic recitation of the elements of a cause of action will
23 not do.” *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 555 (2007). A complaint must
24 contain “sufficient factual matter, accepted as true, to state a claim to relief that is

25 _____
26 ⁴ The registration for the AKC Logo only covers entertainment services;
merchandise is not included. *Id.*

27 ⁵ On January 5, 2023, the Court struck the original complaint because of various
28 deficiencies. Dkt. 10. Plaintiffs filed the operative complaint (the “Complaint”;
Dkt. 13), on January 10, 2023.

1 plausible on its face” to survive a motion to dismiss under Fed. R. Civ. P. 12(b)(6).
 2 *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009). The court is not required to accept as
 3 true a “legal conclusion couched as a factual allegation.” *Id.* (quoting *Twombly*,
 4 550 U.S. at 555). When considering a motion to dismiss, a court may take judicial
 5 notice of “documents [such as copies of works] which are not physically attached
 6 to the complaint but ‘whose contents are alleged in [the] complaint and whose
 7 authenticity no party questions.’” *Zella v. The E.W. Scripps Co.*, 529 F. Supp. 2d
 8 1124, 1128-29 (C.D. Cal. 2007). Moreover, “even if a document is not attached to
 9 a complaint, it may be incorporated by reference into a complaint if the plaintiff
 10 refers extensively to the document or the document forms the basis of the
 11 plaintiff’s claim.” *United States v. Ritchie*, 342 F.3d 903, 908 (9th Cir. 2003).
 12 And, where incorporation by reference applies, “a court may look beyond the
 13 pleadings without converting the Rule 12(b)(6) motion into one for summary
 14 judgment.” *Van Buskirk v. Cable News Network, Inc.*, 284 F.3d 977, 980 (9th Cir.
 15 2002).

16 **IV. UNDER THE *ROGERS V. GRIMALDI* TEST, THE FIRST** 17 **AMENDMENT BARS PLAINTIFFS’ CLAIMS.**

18 Because the First Amendment protects title selection for works of
 19 entertainment, courts in this Circuit do not apply the traditional “likelihood of
 20 confusion” test when the allegedly infringing use is in the title of an expressive
 21 work. *Twentieth Century Fox Television v. Empire Distrib., Inc.*, 875 F.3d 1192,
 22 1196 (9th Cir. 2017). Instead, the plaintiff first must overcome the two-part test
 23 articulated in *Rogers v. Grimaldi*, 875 F.2d 994, and its progeny. *Id.*

24 In *Rogers*, actor Ginger Rogers brought trademark and right of publicity
 25 claims against the producers of a film titled *Ginger and Fred*, about two fictional
 26 Italian cabaret performers. *Rogers*, 875 F.2d at 996-97. The court affirmed the
 27 dismissal of all of Rogers’ claims, holding that “the [Lanham] Act should be
 28 construed to apply to artistic works only where the public interest in avoiding

1 consumer confusion outweighs the public interest in free expression.” *Id.* at 999.
 2 The *Rogers* court held that the balance between trademark rights and the First
 3 Amendment “will normally not support application of the [Lanham] Act unless [1]
 4 the title has ***no artistic relevance*** to the underlying work whatsoever, or, [2] if it
 5 has some artistic relevance, unless the title ***explicitly misleads*** as to the source or
 6 the content of the work.” *Id.*

7 The *Rogers* court also confirmed that, when the use of a trademark
 8 implicates First Amendment rights, the relevant inquiry is ***not*** whether some
 9 consumers might, hypothetically, be confused by the defendant’s use. *Id.* at 1001.
 10 Rather, even if “some members of the public would draw the incorrect inference”
 11 that the plaintiff sponsored or was affiliated with the work, “that risk of
 12 misunderstanding, not engendered by any overt claim ... is so outweighed by the
 13 interests in artistic expression as to preclude application of the Lanham Act.” *Id.*
 14 *Rogers* has been embraced by the Ninth Circuit. *See, e.g., Empire*, 875 F.3d at
 15 1196; *Mattel, Inc. v. MCA Records, Inc.*, 296 F.3d 894 (9th Cir. 2002).⁶

16 Under the *Rogers* test, once the defendant has made a threshold legal
 17 showing that its allegedly infringing use is part of an expressive work, the plaintiff
 18 bears the burden of proving that the defendant’s use of its alleged trademark (1)
 19 has no artistic relevance or (2) is explicitly misleading. *Empire*, 875 F.3d at 1196.
 20 The *Rogers* test applies just as forcefully to claims of reverse confusion as it does
 21 to ordinary “forward” confusion. *See Caiz v. Roberts*, 382 F. Supp. 3d 942, 948-49
 22 (C.D. Cal. 2019). Because, as set forth below, all of Plaintiffs’ claims are subject

23 _____
 24 ⁶ The fact that the Supreme Court is reviewing the Ninth Circuit’s decision in *VIP*
 25 *Prods. LLC v. Jack Daniel’s Properties, Inc.*, 953 F.3d 1170 (9th Cir. 2020), *cert.*
 26 *granted*, — U.S. —, 214 L.Ed.2d 271 (2022) (No. 22-148) to determine whether
 27 the application of *Rogers* was correct in that case, should have no impact on the
 28 disposition of the instant motion. ***First***, *Rogers* is still the law under binding Ninth
 Circuit precedent. ***Second***, even putting *Rogers* aside, this Court can dismiss this
 case—and grant the Motion in Netflix’s favor—based on the *Sleekcraft* analysis in
 Section V, *infra*, alone.

1 to *Rogers*, and Plaintiffs cannot meet their burden of proof on either of the two
 2 *Rogers* prongs, their claims must be dismissed.

3 **A. *Rogers Squarely Applies To This Case.***

4 The *Rogers* test is intended to encourage early, pleading-stage dismissals of
 5 cases involving expressive works. See *Brown v. Elec. Arts, Inc.*, 724 F.3d 1235,
 6 1248 (9th Cir. 2013) (affirming grant of motion to dismiss Lanham Act claims on
 7 *Rogers* grounds, with prejudice, holding that the use was artistically relevant and
 8 that “[t]here is simply no allegation that [defendants] explicitly misled
 9 consumers”); *Jackson v. Netflix, Inc.*, 506 F.Supp.3d 1007, 1016-17 (C.D. Cal.
 10 Dec. 9, 2020) (granting Netflix’s motion to dismiss Lanham Act claims on *Rogers*
 11 grounds). Moreover, *Rogers* applies both to federal Lanham Act claims and to
 12 equivalent state law claims for unfair competition and common law trademark
 13 infringement. *E.S.S. Ent. 2000, Inc. v. Rock Star Videos, Inc.*, 547 F.3d 1095, 1101
 14 (9th Cir. 2008) (“[T]he First Amendment defense applies equally to ESS’s state
 15 law claims as to its Lanham Act claim[s] . . .”); *Winchester Mystery House, LLC v.*
 16 *Global Asylum, Inc.*, 210 Cal. App. 4th 579, 593 (2012) (applying *Rogers* to
 17 California state law unfair competition claims).

18 Here, the Docuseries is unquestionably an expressive work. See, e.g.,
 19 *Empire*, 875 F.3d at 1196 (“The *Empire* television show itself is clearly an
 20 expressive work”); *Jackson*, 506 F.Supp.3d at 1015 (holding that Netflix’s eight-
 21 episode docuseries titled *Tiger King: Murder, Mayhem and Madness* was an
 22 expressive work entitled to First Amendment protection under *Rogers*).

23 Thus, the *Rogers* framework applies to Netflix’s use of the title “The
 24 Confession Killer.”

25 **B. *Netflix’s Use Of “The Confession Killer” Is Artistically Relevant.***

26 The First Amendment protects the use of a trademark in an expressive work
 27 unless that use has “no artistic relevance to the underlying work whatsoever.”

1 *Rogers*, 875 F.2d at 999. “In other words, the level of relevance merely must be
2 above zero.” *E.S.S.*, 547 F.3d at 1100.

3 Here, Netflix’s use of the title “The Confession Killer” easily clears the first
4 *Rogers* prong. The term “The Confession Killer” refers to self-proclaimed serial
5 killer Lucas, who falsely confessed to hundreds of killings. Docuseries, RJN, Ex.
6 A. *See Mattel*, 296 F.3d at 902 (“[T]he song title clearly is relevant to the
7 underlying work, namely, the song itself. As noted, the song is about Barbie and
8 the values [the band] claims she represents.”). Lucas’s “confessions” and the fact
9 that he was a self-proclaimed “killer” play a significant role in the story that the
10 Docuseries tells. In addition, the title refers to Lucas’s nickname, as used in
11 various works published before Plaintiffs formed their band and *well* before
12 Plaintiffs applied for trademark registration of their AKC Logo. *See, e.g.*, RJN,
13 Exs. B, C. Thus, the title “The Confession Killer” is both logically and artistically
14 relevant to the content of the Docuseries. *See, e.g., Empire*, 875 F.3d at 1198-99
15 (title of television series “Empire” was artistically relevant to the show’s setting in
16 the Empire State, and its subject matter, a music entertainment conglomerate,
17 “Empire Enterprises”); *Roxbury Ent. v. Penthouse Media Grp., Inc.*, 669 F. Supp.
18 2d 1170, 1175 (C.D. Cal. 2009) (title “Route 66” was artistically relevant to an
19 adult film about road trips and cross-country travel).

20 ***C. Netflix’s Use Of “The Confession Killer” Does Not Explicitly***
21 ***Mislead.***

22 *Rogers* and its progeny also make clear that, for an expressive use to be
23 “explicitly misleading” under the second prong of the *Rogers* test, the allegedly
24 infringing use must include an “‘**explicit** indication,’ ‘**overt** claim,’ or ‘**explicit**
25 misstatement’ about the source of the work.” *Dr. Seuss Enters., L.P. v. ComicMix*
26 *LLC*, 983 F.3d 443, 462 (9th Cir. 2020) (quoting *Brown*, 724 F.3d at 1245). This is
27 a “high bar.” *Dr. Seuss*, 983 F.3d at 462. “It is key here that the creator must
28 ***explicitly*** mislead consumers.” *Empire*, 875 F.3d at 1199 (quoting *Brown*, 724

1 F.3d at 1245) (emphasis in original). “[T]he mere use of a trademark alone cannot
2 suffice to make such use explicitly misleading.” *E.S.S.*, 547 F.3d at 1100.

3 Critically, such an “overt claim” is required even though consumers might
4 mistakenly believe that there is some connection between the plaintiff and the
5 defendant’s work. In *Rogers*, for example, the court held that the defendants did
6 not “explicitly mislead” despite evidence that “some members of the public would
7 draw the incorrect inference that Rogers had some involvement in the film,” and
8 that one of defendant’s own publicists mistakenly believed that the plaintiff was
9 involved with the film. *Rogers*, 875 F.2d at 997, 1001; *see also Brown*, 724 F.3d
10 at 1246 (“Even if Brown could offer a survey demonstrating that consumers of
11 [defendant’s *Madden NFL* games] believed that Brown endorsed the game, that
12 would not support the claim that the use was explicitly misleading to consumers.”).

13 Plaintiffs do not and cannot allege that **anything** in the Docuseries, its title,
14 or Netflix’s marketing materials (including Netflix’s platform, website, or key art)
15 even suggests—far less “explicitly misleads” (*i.e.*, affirmatively states or overtly
16 claims)—that the Docuseries or Netflix has any relationship whatsoever with
17 Plaintiffs. *See Caiz*, 382 F. Supp. 3d at 951 (dismissal where plaintiff “points to no
18 evidence indicating that the defendants’ use even ‘implicitly suggest[s]’ that the
19 album is associated with Plaintiff, let alone any evidence of an overt association.”).

20 In addition, Netflix’s marketing materials make clear that **Netflix** produced
21 the documentary. Netflix’s name and logo are uniformly present in such materials.
22 *See, e.g.*, Complaint, Ex. 2 (Dkt. 13-2); Complaint ¶ 8 (**Defendants’** marketing,
23 promotion, advertising, distribution, licensing, and offering of the ‘**Netflix**
24 **Original Series...The Confession Killer**”); *The Confession Killer*, NETFLIX
25 (2019), <https://www.netflix.com/title/80213588> (“Watch The Confession Killer |
26 Netflix Official Site”); Netflix, *The Confession Killer* / Now Streaming / Netflix,
27 FACEBOOK (Dec. 6, 2019), [https://www.facebook.com/netflixus/videos/the-](https://www.facebook.com/netflixus/videos/the-confession-killer-now-streaming-netflix/442208653386474/)
28 [confession-killer-now-streaming-netflix/442208653386474/](https://www.facebook.com/netflixus/videos/the-confession-killer-now-streaming-netflix/442208653386474/); *see also Novalogic*,

1 *Inc. v. Activision Blizzard*, 41 F. Supp. 3d 885, 901 (C.D. Cal. 2013) (the
 2 “packaging is very clear as to its origin and source. It prominently displays the
 3 title ‘CALL OF DUTY—MW3,’ and identifies its makers as ‘Activision,’ and its
 4 affiliated studios); *Stewart Surfboards, Inc v. Disney Book Grp.*, LLC, 2011 WL
 5 12877019, at *7 (C.D. Cal. May 11, 2011) (book not explicitly misleading where
 6 “book jacket and spine include the Disney logo, the ‘Disney Press’ logo, and the
 7 Disney channel logo”).

8 Because *Rogers* bars Plaintiffs’ claims, the Complaint should be dismissed
 9 with prejudice, in its entirety. *See Brown*, 724 F.3d at 1248 (affirming dismissal
 10 with prejudice on *Rogers* grounds).

11 **V. PLAINTIFFS CANNOT PLAUSIBLY PLEAD LIKELIHOOD OF** 12 **CONFUSION.**

13 Even assuming *arguendo* that Plaintiffs could overcome Netflix’s *Rogers*
 14 defense, which they cannot, Plaintiffs do not (and cannot) plausibly claim that
 15 consumers are likely to be confused between, one the one hand, Plaintiffs’ use of
 16 “A Killer’s Confession” for sound recordings and live musical performances and,
 17 on the other hand, the title of Netflix’s Docuseries. “To maintain an action for
 18 trademark infringement under 15 U.S.C. § 1114, false designation of origin under
 19 15 U.S.C. § 1125(a) and unfair competition under California law, a plaintiff must
 20 prove the defendant’s use of the same or similar mark would create a *likelihood of*
 21 *consumer confusion*.” *Murray v. Cable Nat. Broad. Co.*, 86 F.3d 858, 860 (9th
 22 Cir. 1996), *as amended* (Aug. 6, 1996). Under the Ninth’s Circuit’s *Sleekcraft* test,
 23 the relevant factors for likelihood of confusion are: (1) strength of the plaintiff’s
 24 mark; (2) proximity or relatedness of the goods; (3) similarity of the marks; (4)
 25 evidence of actual confusion; (5) marketing channels used; (6) type of goods and
 26 likely degree of purchaser care; (7) defendant’s intent in selecting the mark; (8)
 27 likelihood of expansion of the product lines. *Id.* at 348-54. If the court determines
 28 as a matter of law from the pleadings that the goods are unrelated and confusion is

1 unlikely, the complaint will be dismissed. *See, e.g., Toho Co. Ltd. v. Sears,*
 2 *Roebuck & Co.*, 645 F.2d 788, 790-791 (9th Cir. 1981) (affirming district court’s
 3 dismissal of trademark claims at the pleading stage following analysis under
 4 *Sleekcraft*); *Murray*, 86 F.3d at 861 (same).

5 The Ninth Circuit urges “pliant” application of these factors: *i.e.*, the factors’
 6 relative importance—and whether they should all be applied—depends on the facts
 7 of each case. *See Interstellar Starship Servs., Ltd. v. Epix, Inc.*, 304 F.3d 936, 942
 8 (9th Cir. 2002). Indeed, a single factor can be dispositive in a given case. *See*
 9 *Murray*, 86 F.3d at 861. The factors “are a guide to determine whether consumer
 10 confusion is likely and are not to be applied mechanically.” *Delta Forensic Eng’g,*
 11 *Inc. v. Delta V Biomechanics, Inc.*, 402 F. Supp. 3d 902, 907 (C.D. Cal. 2019).
 12 “[T]he resolution of one factor will likely influence the outcome and relative
 13 importance of other factors.” *Id.* “[I]t is often possible to reach a conclusion with
 14 respect to likelihood of confusion after considering only a subset of the factors[.]”
 15 *Brookfield Commc’ns, Inc. v. W. Coast Ent. Corp.*, 174 F.3d 1036, 1054 (9th Cir.
 16 1999).

17 ***A. Plaintiffs Have A Weak Mark In A Crowded Field.***

18 As an initial matter, Plaintiffs’ mark is weak because many entertainment
 19 programs contain the common terms “killer” and “confession,” some existing
 20 decades before Netflix or Plaintiffs used such terms. *See supra* at 4-5. Thus, in
 21 this “‘crowded’ field of look-alike marks, each member of the crowd is relatively
 22 ‘weak’ in its ability to prevent use by others in the crowd.” 2 McCarthy on
 23 Trademarks and Unfair Competition § 11:85 (5th ed.).

24 ***B. The Lack Of Relatedness Of The Goods And Services Precludes Any***
 25 ***Likelihood Of Confusion.***

26 The relatedness or proximity of goods is measured by whether the products
 27 are: (1) complementary; (2) sold to the same class of purchasers; and (3) similar in
 28 use and function. *Sleekcraft*, 599 F. 2d at 350. Here, Plaintiffs have not (and

1 cannot) plead facts showing that the goods produced by Netflix are related or
 2 sufficiently similar to those offered under the AKC Logo or otherwise produced by
 3 Plaintiffs.⁷ Under *Twombly*, 550 U.S. at 555, this is reason enough for wholesale
 4 dismissal of Plaintiffs' claims.

5 Moreover, as a matter of law, the goods and services using the marks at
 6 issue are dissimilar. See *Newton v. Thomason*, 22 F.3d 1455, 1462 (9th Cir. 1994)
 7 (holding that music production and performances were "completely unrelated" to a
 8 television series). Plaintiffs' consumers would encounter the AKC Logo when
 9 purchasing tickets to live musical performances, purchasing AKC's audio
 10 recordings, or purchasing AKC-related merchandise. Complaint ¶ 10. In contrast,
 11 Netflix's consumers would encounter the Docuseries only on Netflix or via
 12 marketing materials for the Docuseries. Complaint ¶ 7. Fundamentally, the goods
 13 or services that Plaintiffs and Netflix offer ***are not related or sold to the same class***
 14 ***of purchaser***, and have ***dissimilar uses and functions***. As explained in *Sleekcraft*,
 15 ***"[i]f the goods are totally unrelated, there can be no infringement because***
 16 ***confusion is unlikely.*"** 599 F. 2d at 348. Put differently, Plaintiffs' claims of
 17 consumer confusion arising from Netflix's use of "The Confession Killer" fail for
 18
 19
 20

21 ⁷ See *Murray*, 86 F.3d at 860-61 (dismissal appropriate at the pleading stage where
 22 plaintiff's trademark for "America Speaks" was used for his "man-on-the-street"
 23 market research business for use in television commercial advertising while the
 24 defendant CNBC provided a talk-show television program entitled "America's
 25 Talking" to cable television viewers); *Robinson v. Hunger Free Am., Inc.*, 2018
 26 WL 1305722, at *4 (E.D. Cal. Mar. 13, 2018) (dismissing trademark infringement
 27 claim at the pleading stage because "the types of goods utilizing the 'Hunger Free
 28 America' mark are dissimilar. Plaintiff's consumers would encounter the [] mark
 when purchasing a t-shirt. . . but Defendant's participants would encounter the
 mark when utilizing hunger-relief programs or engaging in an anti-hunger program
 sponsored by Defendant").

1 the simple reason that Plaintiffs have not alleged that they produce television
2 programming.⁸

3 ***C. The Parties' Marks Are Dissimilar And Encountered In Completely***
4 ***Different Ways In The Marketplace.***

5 It is axiomatic that marks must be viewed in their entirety when
6 determining whether they are “similar” for purposes of the third *Sleekcraft* factor.
7 *See Groupon, LLC v. Groupon, Inc.*, 826 F. Supp. 2d 1156, 1164 (N.D. Cal. 2011)
8 (explaining that courts assess the similarity of marks in “appearance, sound, and
9 meaning” and “consider[] [the marks] in their entirety and as they appear in the
10 marketplace”). Here, the marks are plainly different.

11 The trademark rights enumerated in Plaintiffs’ registration for the AKC
12 Logo only cover a specific, stylized design consisting of the words “A Killer’s
13 Confession” with “stylized droplets around the wording.” *See* Complaint, Ex. 1.
14 By contrast, Netflix uses the phrase “The Confession Killer,” with no droplets
15 around the wording and accompanied by an identifier of the source of the
16 Docuseries: the term “Netflix” or Netflix’s logo. *See* Complaint, Ex. 2;
17 Docuseries, RJN, Ex. A; *see also Lindy Pen Co., Inc. v. Bic Pen Corp.*, 725 F.2d
18 1240, 1245 (9th Cir. 1984). Plaintiffs concede as much in their Complaint, always
19 using the word “Netflix” to describe the source of the Docuseries. *See supra* at 3.
20 Such clear labeling or emphasis on “house marks”⁹ eliminates the risk of
21 confusion. *Network Automation, Inc. v. Advanced Sys. Concepts, Inc.*, 638 F.3d

22
23
24 ⁸ Nor have Plaintiffs provided any evidence that they intend to expand into the
25 television programming space. So the “likelihood of expansion” factor favors
Netflix as well.

26 ⁹ In the context of film and television programming, a “house mark” is often used to
27 identify the provider of a wide variety of programming. *See, e.g., MGFB*
28 *Properties, Inc. v. Viacom Inc.*, 54 F.4th 670, 682 (11th Cir. 2022) (Viacom’s
“house mark” for its *Jersey Shore* spin-offs was “MTV”).

1 1137, 1153-54 (9th Cir. 2011); *Cohn v. Petsmart, Inc.*, 281 F.3d 837, 843 (9th Cir.
2 2022).

3 To the extent Plaintiffs allege that the parties' shared use of a scripted font in
4 their respective marks weighs in Plaintiffs' favor on this factor, they are incorrect.
5 *See, e.g., Conte v. Newsday, Inc.*, 2013 WL 978711, at *21 (E.D.N.Y. 2013) (use
6 of similar fonts only marginally relevant where defendant vitiated any potential
7 confusion by including its well-known house mark). In any event, aside from both
8 being script, the fonts of the parties' respective marks are nothing alike. In the
9 AKC Logo, the first letters of each word are nearly three times the size of the rest
10 of the letters. Complaint, Ex. 1. In addition, the first letters extend well below the
11 other letters to form what look like blood spatters (with droplets even being an
12 element identified in the logo's description with the USPTO). Complaint, Ex. 1.
13 In contrast, Netflix's use of the title "The Confession Killer" is in the same font as
14 Lucas's own confession notes. *Compare* Docuseries, RJN, Ex. A, Episode 1
15 (~13:30-13:51), *with* Complaint, Ex. 2. There are no stylized elements in the
16 Netflix title, and the first letter of each word is the same size as the rest of the
17 letters.

18 Ultimately, "the overall impression created by the [marks] and the context in
19 which they are found and [a] consider[ation] [of] the totality of factors that could
20 cause confusion among prospective purchasers," establishes, as a matter of law,
21 that the two marks are dissimilar and would not "provoke confusion among
22 prospective purchasers." *Streetwise Maps, Inc. v. Vandam, Inc.*, 159 F.3d 739, 744
23 (2d Cir. 1998); *Lindy Pen*, 725 F.2d at 1245 (identical word marks on pens
24 dissimilar given omnipresence of company marks and logos); *Embarcadero*
25 *Techs., Inc. v. Rstudio, Inc.*, 105 U.S.P.Q.2d 1825 (T.T.A.B. 2013) (one letter
26 difference sufficient to distinguish marks where the marks engender different
27 commercial impressions).

D. Plaintiffs Do Not Plausibly Allege Any Actual Confusion.

“[T]he Lanham Act seeks to prevent consumer confusion that enables a seller to pass off his goods as the goods of another.” *Bosley Med. Inst., Inc. v. Kremer*, 403 F.3d 672, 677 (9th Cir. 2005). “Trademark infringement protects only against mistaken purchasing decisions and not against confusion generally.” *Id.* Furthermore, a “lack of evidence about actual confusion after an ample opportunity for confusion can be a powerful indication that the junior trademark does not cause a meaningful likelihood of confusion.” *Cohn v. Petsmart, Inc.*, 281 F.3d 837, 843 (9th Cir. 2002).

Plaintiffs’ purported “examples” of consumer confusion—namely, the alleged “boycotting of AKC on the erroneous belief . . . that AKC is a supporter of serial killers,” death threats, and other “associat[ion]” between AKC and serial killers—fail to allege legally relevant actual confusion. Complaint ¶ 19. Significantly, Plaintiffs never allege that *potential consumers* of its services have been confused, which is fatal to their claims.¹⁰

E. The Parties’ Marketing Channels Are Dissimilar.

Differences in the parties’ marketing channels “weigh[] heavily” in the ultimate assessment of whether there is a likelihood of confusion.” *M2 Software, Inc. v. Madacy Ent.*, 421 F.3d 1073, 1084 (9th Cir. 2005). Plaintiffs do not allege that the parties use similar marketing channels. *See generally* Complaint. Thus, as a matter of law, this factor favors Netflix.

¹⁰ Plaintiffs also fail to acknowledge that perhaps the association between their band and “killers” might have something to do with the fact that their band is named “A Killer’s Confession”; their recent tour was coined “Year of the Killer’s Tour”; their lead singer wears costumes that evoke serial killers; they have released songs with titles such as “Roots Bloody Roots,” “Monster,” “Final Breath,” and “Knife from Behind”; and their merchandise encourages people to “kill pedophiles.” *See supra* at 2.

1 Even to the extent Plaintiffs' Complaint could be construed liberally to
 2 indicate that the parties' shared use of the Internet for marketing constitutes similar
 3 marketing channels, such an argument would be misplaced, as a matter of law.
 4 Offering music for sale online is insufficient to support likelihood of confusion.
 5 *Madacy*, 421 F.3d at 1084 ("offer[ing] CDs for sale over the internet in general,
 6 and on 'Amazon.com' in particular," failed to demonstrate likelihood of
 7 confusion); *see also Network Automation*, 638 F.3d at 1151 ("[T]his factor
 8 becomes less important when the marketing channel is less obscure. Today, it
 9 would be the rare commercial retailer that did not advertise online.").

10 In any event, the parties' marketing channels do not overlap. Plaintiffs offer
 11 their goods and services on their page on the e-commerce platform Shopify (*see*
 12 [https://akillersconfession.myshopify.com/?fbclid=IwAR3fFFEi2eWXXuizMbCxf5](https://akillersconfession.myshopify.com/?fbclid=IwAR3fFFEi2eWXXuizMbCxf5JjpARYnVygVVJFhGmtedL0vgOTldKhLsJ3m7Q)
 13 [JjpARYnVygVVJFhGmtedL0vgOTldKhLsJ3m7Q](https://www.facebook.com/akillersconfession/)), their Facebook page (*see*
 14 <https://www.facebook.com/akillersconfession/>), and on music streaming services
 15 (*see, e.g.,* <https://open.spotify.com/artist/5zLrMhpswOj8Wk9EK1PTDM>). Netflix
 16 does not offer to stream the Docuseries on any of these platforms. The Docuseries
 17 is only available to stream on Netflix (after a consumer has already purchased a
 18 subscription). *See, e.g.,* Complaint ¶ 7; *see also The Confession Killer*, NETFLIX
 19 (2019), <https://www.netflix.com/title/80213588> ("Watch The Confession Killer |
 20 Netflix Official Site"). This factor thus weighs against Plaintiffs. *See Groupon*,
 21 826 F. Supp. 2d at 1164 ("To the extent the companies market or advertise outside
 22 of the internet, their marketing channels differ ... Groupon engages in substantial
 23 television, radio, and billboard advertising. [The plaintiff] does not.").¹¹

24
 25
 26 ¹¹ *See also Hanginout, Inc. v. Google, Inc.*, 54 F. Supp. 3d 1109, 1127 (S.D. Cal.
 27 2014) ("Where both parties utilize the internet to market the products at issue . . .
 28 this factor carries little weight in the likelihood of confusion calculation") (citing
Playboy Enters., Inc. v. Netscape Commc'ns Corp., 354 F.3d 1020, 1028 (9th Cir.
 2004)).

F. The Degree Of Care Exercised By Consumers Eliminates Any Possibility Of Confusion.

Courts assess this factor based on “the typical buyer exercising ordinary caution.” *Sleekcraft*, 599 F.2d at 353. Confusion is less likely where buyers exercise care and precision in their purchases such as for “sophisticated items.” *Dfinity Found. v. Meta Platforms, Inc.*, 2022 WL 16857036, at *9 (N.D. Cal. Nov. 10, 2022). Notably, purchasers of musical albums are considered to be very sophisticated purchasers, and are able to differentiate between styles of music, such as jazz and hip hop, in making purchasing decisions. *See Sunenblick v. Harrell*, 895 F. Supp. 616, 634 (S.D.N.Y. 1995), *aff’d*, 101 F.3d 684 (2d Cir. 1996) (“buyers of musical recordings are relatively sophisticated consumers whose purchasing decisions are driven by a recognition of and search for a particular artist or composition.”). Furthermore, the Ninth Circuit has acknowledged that “the default degree of consumer care is becoming more heightened as the novelty of the Internet evaporates and online commerce becomes commonplace . . . consumers who use the [I]nternet for shopping are generally quite sophisticated . . .” *Network Automation*, 638 F.3d at 1152.

Thus, since a heightened “sophistication ‘of consumers usually militates against a finding of likelihood of confusion[,]’” consideration of this factor supports a finding that there is no likelihood of confusion. *Glow Indus., Inc. v. Lopez*, 273 F. Supp. 2d 1095, 1127 (C.D. Cal. 2003).

G. Netflix’s Intent In Selecting Its “The Confession Killer” Title Had Nothing To Do With Plaintiffs.

For this factor to support a likelihood of confusion, Plaintiffs must allege that Netflix “intended to profit by confusing consumers.” *Toho*, 645 F.2d at 791 n.2. Plaintiffs have made no such allegations. To the contrary, Netflix’s identification of the Docuseries with the “Netflix” brand makes clear that Netflix wants consumers to watch the Docuseries, remember that it was produced by

1 Netflix, and then return to Netflix to continue watching the Docuseries or to stream
 2 Netflix's other offerings. This "clear labeling of [the Docuseries] with [Netflix's]
 3 brand negates any inference of intent to trade on [Plaintiff's] mark." *Skechers*
 4 *U.S.A., Inc. v. Vans, Inc.*, 2007 WL 4181677, at *8 (C.D. Cal. Nov. 20, 2007).

5 ***H. The Parties Are Unlikely To Expand Into Each Other's Sphere Of***
 6 ***Business.***

7 "To resolve this factor, [courts] must determine whether existence of the
 8 allegedly infringing mark is hindering the plaintiff's expansion plans." *Survivor*
 9 *Media, Inc. v. Survivor Prods.*, 406 F.3d 625, 634 (9th Cir. 2005). Only a "'**strong**
 10 **possibility**' that either party may expand his business to compete with the other
 11 will weigh in favor of finding that the [] use is infringing." *Pascucci, Inc. v. Caffè*
 12 *Pascucci Torrefazione S.P.A.*, 2011 WL 13220127, at *4 (C.D. Cal. July 8, 2011)
 13 (quoting *Sleekcraft*, 599 F.2d at 354). Because Plaintiffs fail to allege any
 14 intention of expansion into Netflix's line of business—let alone a "strong
 15 possibility" of expansion, as required—this factor also weighs against a finding of
 16 likelihood of confusion.

17 * * *

18 In sum, even were the Court to reach the *Sleekcraft* factors, Plaintiffs fail to
 19 state a claim upon which relief can be granted.

20
 21 **VI. CONCLUSION**

22 For the reasons set forth herein, Netflix requests that the Court dismiss all of
 23 Plaintiffs' claims without leave to amend.

24 Dated: May 5, 2023

MITCHELL SILBERBERG & KNUPP LLP

26 By: /s/Robert H. Rotstein

27 Robert H. Rotstein

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CERTIFICATE OF COMPLIANCE

The undersigned, counsel of record for Defendant Netflix, Inc., certifies that this Memorandum of Points and Authorities contains 5,983 words and does not exceed 25 pages, which complies with the word limit of L.R. 11-6.1 and the Court's Standing Order dated June 5, 2020.

Dated: May 5, 2023

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